Petition

81-1846

No. _____

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BARBARA LUSTGARTEN, M.D.,

Petitioner,

vs.

DAVID S. AYRES, M.D., PAUL W. TERRELL, M.D., JOSE RAFFINAN, M.D., MARIA RAFFINAN, M.D., FRANK C. BAKER, CHARLES H. BAIR, JAMES GIBBS, JOHN W. ABERNATHY, WENDELL L. HAREWOOD, VIRGINIA ROGERS, KELLEY D. FERGUSON, LAWRENCE SONNER, GEORGE WILKIN, DANIEL WOLKER, GEORGE HASTINGS, T. J. BELLESON, EUGENE A. PYLE, ERNEST WILLIAMSON, R. PAUL PENCE, ED JOHNSON, JOHN H. HARDWICK, RICHARD GRIFFITH, BOARD OF GOVERNORS OF HIGHLAND DISTRICT HOSPITAL, HIGHLAND DISTRICT HOSPITAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a civil rights Plaintiff must commence a civil rights action in federal court prior to or in lieu of any administrative review in state court of a state agency decision to avoid preclusion as *res judicata* of all available but unlitigated civil rights claims and constitutional issues which the administrative appeal was inadequate to determine and which could not be fully and fairly litigated therein under state law.

II. Whether a federal court may grant preclusive effect to a judgment of an Ohio court in a statutory appeal from the decision of a public hospital board so as to bar, as *res judicata*, a physician's unlitigated civil rights claims against the hospital and others, without regard to law of the state which recognizes all civil claims as causes of action distinct from such appeals and not precluded thereby in the courts of the state, and which limits the ability of the physician to have her civil rights claims heard and the evidence to support them presented in such an appeal and without regard to the facts showing the actual limitations of the proceedings.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This petition seeks review of the Order of the United States Court of Appeals for the Sixth Circuit in *Barbara*

Lustgarten, M.D. v. *David S. Ayres, M.D., et al.*, No. 80-3766, affirming the Summary Judgment of the United States District Court, Southern District of Ohio, Western Division, Civil Action No. C-1-78-694, neither of which is reported. Both are appended hereto [Appendix, p. 1a and Appendix, p. 5a, respectively].

JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Sixth Circuit on January 6, 1982.

No rehearing or extension of time within which to petition for certiorari was sought or granted.

Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT XIV

> § 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738:

STATE AND TERRITORIAL STATUTES AND JUDICIAL PROCEEDINGS; FULL FAITH AND CREDIT.

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory of Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983:

CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985 (2) :

OBSTRUCTING JUSTICE; INTIMIDATING PARTY, WITNESS, OR JUROR.

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property to lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

42 U.S.C. § 1985 (3) :

DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES.

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or

securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

OHIO REVISED CODE, § 2506.01:

APPEAL FROM DECISIONS OF ANY AGENCY OF ANY POLITICAL SUBDIVISION.

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in §§ 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by §§ 2506.01 to 2506.04, inclusive of the Revised Code.

The appeal provided in §§ 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administra-

tive authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specific person; nor any order issued preliminary to or as a result of a criminal proceeding.

OHIO REVISED CODE, § 2506.03:

HEARING OF APPEAL.

The hearing of such appeal shall proceed as in the trial of a civil action but the court shall be confined to the transcript as filed pursuant to § 2506.02 of the Revised Code unless it appears on the face of said transcript or by affidavit filed by the appellant that:

(A) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(B) The appellant was not permitted to appear and be heard in person or by his attorney in opposition to the order appealed from:

1. To present his position, arguments and contentions;

2. To offer and examine witnesses and present evidence in support thereof;

3. To cross examine witnesses purporting to refute his position, arguments and contentions;

4. To offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions;

5. To proffer any such evidence into the record, if the admission thereof is denied by the officer or body appealed from.

(C) The testimony adduced was not given under oath.

(D) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the

officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.

(E) The officer or body failed to file with the transcript, conclusions of fact supporting the order, adjudication or decision appealed from; in which case, the court shall hear the appeal upon the transcript and such additional evidence as may be introduced by any party. At the hearing, any party may call as if on cross-examination, any witness who previously gave testimony in opposition to such party.

OHIO REVISED CODE, § 2506.04:

FINDING AND ORDER OF COURT.

The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law pursuant to §§ 2505.01 to 2505.45, inclusive, of the Revised Code.

STATEMENT OF THE CASE

This is an action in which the federal courts below have held that unlitigated civil rights claims of Petitioner are barred as *res judicata* on the basis of a state court judgment in an administrative appeal which dealt with only some of the issues involved in the civil rights claims. The civil rights action included claims based upon acts by defendants occurring after that state judgment.

The Civil Rights Claims

Barbara Lustgarten, M.D., an anesthesiologist, brought this civil rights action in federal district court against a public hospital in Hillsboro, Ohio, its board of governors and administrator, and certain physicians, alleging that they had acted and conspired unlawfully to deprive her of her medical practice without due process of law and to discriminate against her by exploitation of sex, ethnic and religious prejudices of the community. She sued under 42 U.S.C. 1983 and 1985 (3); jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1343.

Dr. Lustgarten supplemented her federal complaint to assert acts by the hospital after commencement of the action in furtherance of the violations originally claimed and including a violation under 42 U.S.C. 1985 (2) for denial of her rights on the basis that she was maintaining this action in federal court. The asserted claims included several occurrences wherein Dr. Lustgarten had been denied her right to exercise medical staff privileges at the hospital.

The Prior State Court Judgment

Two years prior to the bringing of this action, Dr. Lustgarten had appealed to state court from a decision of the

hospital board to revoke her hospital privileges for the year 1976-1977. The state court had affirmed.[1]

Ohio law provides for appellate review of the decision of a hospital board in the Common Pleas Court of the County. § 2506.01 Ohio Revised Code. Dr. Lustgarten took such an appeal to state court under the procedures of § 2506.03, Ohio Revised Code. The court affirmed the decision of the board [Appendix, p. 12a], again without findings or opinion [Appendix, p. 13a]. That decision was appealed to the Court of Appeals of Highland County, Ohio, which affirmed under the standards of § 2506.04 Ohio Revised Code, rendering the only opinion in the course of the appeal [Appendix, p. 15a]. The Supreme Court of Ohio denied a motion to certify the record and refused jurisdiction over the appeal [Appendix, pp. 29a, 30a]. This court denied certiorari [Appendix, p. 31a].

The Issues in the State Court Proceeding

Dr. Lustgarten's civil rights claims were neither raised nor decided in the administrative appeal proceeding. Under Ohio law, a civil claim is brought only in an action distinct from an administrative appeal under §§ 2506.01-04, Ohio Revised Code. *Tuber* v. *Perkins,* 6 Ohio St. 2d 155 (1966); *Transcon Builders, Inc.* v. *City of Lorain,* 49 Ohio App. 2d 145 (1976). Dr. Lustgarten brought no such separate civil action in an Ohio court. Prior to the administrative appeal, Dr. Lustgarten brought no civil action in federal

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[1] This particular revocation of Dr. Lustgarten's hospital privileges had originally been threatened by the hospital without a prior hearing, and Dr. Lustgarten had to petition the state court for a resraining order. That court instead mandated an expedited hearing by the hospital board, which resulted in a decision without findings or opinion to immediately revoke Dr. Lustgarten's staff privileges for the upcoming year. [Appendix, p. 10a].

court, and accordingly, no invocation by a federal court of the abstention doctrine pending the administrative appeal in state court was made.

The administrative appeal determined some issues of procedural due process in connection with the 1976 board hearing. It was held that the participation by Dr. Ayres, Dr. Lustgarten's principal accusor and competitor, on the board which heard the question of her privileges, did not violate due process; absence of evidence as to the "extent" of Dr. Ayres' interest in the outcome was cited as a reason [Appendix, p. 20a]. At that hearing, over Dr. Lustgarten's objection, Dr. David Ayres, the physician who alone administered all of the anesthesia at the hospital prior to Dr. Lustgarten's arrival there in 1972, and her principal accusor, was allowed to sit as a member of the board rather than be compelled to appear as a witness and submit to cross examination [Appendix, pp. 18a-19a].

Dr. Ayres, as a member of the board at the hearing, was not and could not be cross examined by Dr. Lustgarten upon appeal to the state court. A board member may not be called as a witness and examined in court on the appeal under § 2506.03 Ohio Revised Code. *Libis* v. *Board of Zoning Appeals,* 33 Ohio App. 2d 94 (1962). Later deposed in the present federal action, Dr. Ayres disclosed the extent of his pecuniary interest in Dr. Lustgarten's anesthesia practice; he admitted that his own testimony was the sole source known to him of such evidence (Dr. Ayres was the principal defendant to Dr. Lustgarten's civil rights claims).

It was also held in the administrative appeal that the notice and right to cross examine witnesses who appeared were adequate [Appendix, pp. 20a-24a] and that no judicial trial was required [Appendix, p. 17a]. The state court

resolved that certain determinations of the board would not be subject to review [Appendix, p. 26a], and that the standard for affirmance of the board by the court, under § 2506.04, Ohio Revised Code, was the existence of reliable, substantive and probative evidence in the hearing transcript (i.e., the test applicable to affirmance of a jury verdict). [Appendix, p. 25a]. Evidence of the conduct of other doctors necessary to the presentation of a discrimination charge was excluded by the board from consideration at the hearing. No issues of discrimination, and no issue of denial of due process in connection with any event other than the hearing, were considered in the appeal.

The Preclusion of Unlitigated Claims and Issues

In the district court below, it was concluded that, having been a party to the state appeal in which the civil rights claims were not litigated, Dr. Lustgarten was barred by *res judicata* from raising the unlitigated civil rights claims in federal court. No distinction between claims which might have arisen after or apart from the 1976 board decision was made by the district court.

At the close of the pretrial proceedings, the district court had issued a final pretrial order formulated and agreed to by all parties listing controverted questions of fact including whether a full and fair opportunity had been given Dr. Lustgarten to litigate her claims in the state administrative appeal. The district court, however, did not decide these questions, nor did it open the depositions of the board members submitted by Dr. Lustgarten; these remained sealed in the record on appeal. Instead, ignoring these agreed factual controversies, the district court granted summary judgment on behalf of all defendants on all claims.

The Court of Appeals below affirmed the district court on the basis of *res judicata* and added that the issues of procedural due process with respect to the 1976 hearing had been fully and fairly litigated in the state administrative appeal and, therefore, were barred by collateral estoppel. The Court of Appeals also decided without regard to the depositions submitted by Dr. Lustgarten that she had no property right after 1976. Thus the federal courts below gave total preclusive effect to the judgment of the Ohio courts in the administrative appeal. It did so without any analysis of the state court's own view of the scope of such an administrative appeal.

The Ohio Law of Preclusion

Under Ohio Law, a statutory administrative appeal under §§ 2506.01-.04, Ohio Revised Code is a cause of action distinct from other civil actions and a judgment therein does not preclude a later civil rights action. *Jones* v. *Petruska,* 13 Ohio Op. 3d 111 (Ct. App. Cuyahoga Cty., 1979). Under Ohio law, "[a] judgment [or decree] in a former action does not bar a subsequent action where the cause of action prosecuted is not the same, even though each relates to the same subject matter." *Norwood* v. *McDonald,* 142 Ohio St. 299, 305 (1943); *Whitehead* v. *General Telephone Co. of Ohio,* 20 Ohio St.2d 108 (1969). To test for the same cause of action under Ohio Law one must "consider the identity of facts[2] essential to their mainten-

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[2] Neither the district court nor the court of appeals below could have considered the preclusion issue in the contexts of the fact questions it presented. The questions of fact relating to the scope, fairness and adequacy of the State proceeding as set forth in the district court's pretrial order remain unanswered. The depositions of the board members in the record retain the court reporter's original seals. They were tendered by Dr. Lustgarten to show that the discrimination issue was ex-

ance, or whether the same evidence would sustain both." *Norwood* v. *McDonald,* 142 Ohio St. 299, 306 (1943). Nor is an Ohio judgment *res judicata* to a claim against one not a party to the proceeding in which the judgment was rendered. *Columbus* v. *Cemetery,* 45 Ohio St. 2d 47 (1976).

REASONS TO ALLOW WRIT

The extent to which the federal courts apply principles of *res judicata* and collateral estoppel to bar unlitigated constitutional issues and civil rights claims following limited state proceedings can encourage or deter a plaintiff's submission to limited proceedings in state courts. It can also increase or reduce a plaintiff's need to commence a civil rights action in federal court prior to or in lieu of state proceedings. Analysis of the options that faced Petitioner here, and the implications of the decisions below show that, under these decisions, a potential civil rights plaintiff such as Petitioner here is in great peril of losing her civil rights claims unless she submits them early to federal court and avoids limited state proceedings.

This Court has still not directly decided the question of whether or when unlitigated claims under 28 U.S.C. §§ 1983 or 1985 are subject to preclusion as *res judicata* on the basis of prior state proceedings. *Allen* v. *McCurry,* 449 U.S. 90 (1980) The courts below have concluded they are. Their decisions also are in implicit conflict with this court's discussions that hold that the state law of preclusion controls the effect of state judgments on federal court proceedings, and that the adequacy of state pro-

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cluded from consideration by the board, that other meetings occurred to consider her privileges, and that events occurred giving her a property right in staff privileges apart from and after the 1976 hearing.

ceedings is relevant to the question as to whether a full and fair opportunity to litigate existed in state court so as to allow preclusive effect to be given to the state court judgment. *Allen* v. *McCurry*, 449 U.S. 90 (1980); *Montana* v. *U.S.*, 440 U.S. 147 (1979); *Monroe* v. *Pape*, 365 U.S. 176 (1961). Claims supported by acts of defendants that occurred after the state judgment in further violation of a plaintiff's rights cannot be barred by that prior judgment. *Lawlor* v. *National Screen Service*, 349 U.S. 322 (1955). The implications of the decisions below are revealed by review of the options that were available to Petitioner here.

In July of 1976, Dr. Lustgarten was in a position to assert certain civil rights claims against some of the Respondents. Also, she had just received an adverse administrative decision from which the State of Ohio had provided a procedure for appeal under §§ 2506.01-04, Ohio Revised Code.[3]

At this point, Dr. Lustgarten had the following options:

(1) She could have filed a civil rights action in federal court immediately, and simultaneously proceeded with an appeal under §§ 2506.01-04, Ohio Revised Code, relying on *England* v. *Medical Examiners*, 375 U.S. 411 (1964), for preservation of her civil rights claim.

(2) She could have filed a civil rights claim in federal court immediately, and declined to pursue an appeal

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[3] Whether or not Dr. Lustgarten could have, at this early date, commenced a civil rights action based on this administrative decision itself was not considered by the courts below. It should be noted that in a §§ 2506.01-04 appeal, the state court was capable of, and ultimately did, defer implementation of the administrative decision.

under §§ 2506.01-04, Ohio Revised Code. Had she done so, she might have been held to have waived the right to assert any claim based on the subject matter of the administrative decision, if and when it were implemented.[4]

(3) She could have, in lieu of or in addition to an appeal under §§ 2506.01-04, Ohio Revised Code, filed a civil action in state court raising all available civil rights claims.

(4) She could have pursued her statutory appeal with the possibility that she would obtain such relief as to prevent her civil rights from being therein denied and as to render litigation of her other civil rights claims unnecessary.

Dr. Lustgarten pursued the fourth option. When the state proceeding was completed, the judgment was adverse to Dr. Lustgarten. Respondents had by then committed further violations of her rights. Her civil rights claims had not been litigated, nor had issues of discrimina-

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[4] Arguably, an appeal to state court under §§ 2506.01-04, Ohio Revised Code is an extension of the administrative procedure to be exhausted before a civil rights claim may be brought, at least where the implementation of the injury is deferred. Alternatively, under a possible corollary to this Court's recent decision in *Parratt* v. *Taylor*, —— U.S. ——, 101 S.Ct. ——, 68 L.Ed.2d 420 (1981), it could be held that the availability of the statutory appeal to correct the constitutional deficiencies of the board hearing supplied the necessary due process to prevent the deprivation of rights from rising to a constitutional violation, and that a Plaintiff could not complain unless and until such a procedure is invoked and, as here, the state court procedures have proved inadequate. Plaintiff would argue that a civil rights claim would not arise until due process had been denied, which would have been upon the decision of the state court wherein the procedures proved inadequate. See *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673 (1930).

tion or of denials of her rights without due process (except at the 1976 hearing) been litigated.

Dr. Lustgarten then filed her civil rights action in federal court asking the court to hear her unlitigated civil rights claims and to resolve the adequacy of the state procedure under the circumstances,[5] and, on the basis of her evidence, to determine whether she had been denied a full and fair opportunity to litigate any constitutional issues in the state appeal, or whether, in the alternative, she would to any extent be barred by collateral estoppel. The district court below declined to make those determinations or hear her unlitigated claims, instead holding them all barred by *res judicata*. Affirmance of this decision by the Court of Appeals in this publicized case, will as a practical matter, operate as an incentive to plaintiffs who wish the right to a federal forum for litigation of civil rights claims to avoid limited state proceedings.

The Decisions of this Court on the Preclusion of Unlitigated Civil Rights Claims.

The decisions of the courts below conflict with holdings of this Court in *Allen* v. *McCurry*, 449 U.S. 90 (1980), and also with the views of the dissent in that case. The courts below have also decided questions involving the preclusion of unlitigated issues and claims in actions under 42 U.S.C. §§ 1983 and 1985, which have not been, but should be, settled by this Court.

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[5] The procedure is that of §§ 2506.01-04, Ohio Revised Code, as interpreted by the courts of Ohio: *Tuber* v. *Perkins*, 6 Ohio St. 2d 155 (1966), *Transcon Builders, Inc.* v. *City of Lorain*, 49 Ohio App. 2d 145 (1976), *Libis* v. *Board of Zoning Appeals*, 33 Ohio App. 2d 94 (1962). These are discussed under Petitioner's Statement of the Case.

This Court, prior to *Allen* v. *McCurry,* "had never directly decided whether the rules of *res judicata* and collateral estoppel are generally applicable to 1983 actions." 449 U.S. at 96. The Court there dealt directly with only collateral estoppel in precluding previously litigated issues:

> "Contrary to the suggestion in the dissenting opinion, post, at 113, n. 12, this case does not involve the question whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation." 449 U.S. 90 at 94, n. 5.

Accordingly, the issue of preclusion of unlitigated constitutional issues in federal civil rights actions, or of the unlitigated claims themselves, is undecided by this Court, and should be resolved.

> "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen* v. *McCurry,* 449 U.S. 90, 96.

28 U.S.C. § 1738 requires that the full faith and credit given by a federal court to a state-court judgment be "the same full faith and credit . . . as they have by law or usage in the courts of such State." In the courts of Ohio, an appeal under §§ 2506.01-04 is a cause of action distinct from, and not preclusive of, a civil action, even one arising from the same subject matter. *Jones* v. *Petruska,* 13 Ohio Op. 3d 111 (Ct. App. Cuyahoga Cty., 1979), applying *Norwood* v. *McDonald,* 142 Ohio St. 299 (1943), *Whitehead* v. *General Telephone Co. of Ohio,* 20 Ohio St. 2d 108 (1969). *Res judicata* is only available against the same parties and their privies. *Columbus* v. *Cemetery,* 45 Ohio St. 2d 47 (1976).

> "In reviewing the legislative history of § 1983 in *Monroe* v. *Pape* [*Monroe* v. *Pape*, 365 U.S. 176 (1961)], the Court inferred that Congress had intended a federal remedy in three circumstances: where the state procedure was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-174. * * * Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a fair opportunity to litigate the claim or issue decided by the first court." *Allen* v. *McCurry*, 449 U.S. 90, 100-101.

See also *Montana* v. *United States*, 440 U.S. 147 (1979).

CONCLUSION

This case is not simply one in which the lower courts made common error, even though the ultimate treatment by the courts below does not reflect thorough treatment of the issues. This is a case where civil rights claims which had never been litigated in either state or federal court were held barred under the theory of *res judicata* after the parties had spent great effort and expense, and an extensive record had been generated in the district court. Due to uncertainties in the law, the Petitioner's efforts to preserve her civil rights claims have failed because she chose not to sue in federal court before allowing the Ohio appeal process to be completed, an action that might have rendered litigation of her civil rights claims unnecessary.

Several direct or implicit questions are presented by this case, any one of which, if considered by this Court, would provide a basis for the next logical step in this

Court's articulation of the law of preclusion of civil rights actions by prior state court judgments. Such an extension would remove the doubt and jeopardy connected with a litigant's involvement in limited state proceedings.

This court should grant certiorari, and thereupon reverse the judgment of the Court of Appeals below and remand for further proceedings.

WHEREFORE, it is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

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Of Counsel

Appendix

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-3766

BARBARA LUSTGARTEN, M.D.,

Plaintiff-Appellant,

v.

DAVID S. AYRES, M.D., PAUL W. TERRELL, M.D., JOSE and MARIE RAFFINAN, M.D.S., et al.,

Defendants-Appellees.

ORDER

(Filed January 6, 1982)

Before: ENGEL and KEITH, Circuit Judges and ALLEN, District Judge*

Barbara Lustgarten, an anesthesiologist, appeals from a summary judgment entered by the district court in favor of all defendants in her civil rights action brought under 42 U.S.C. §§ 1983 and 1985 and asserting pendent claims under the Ohio antitrust laws. The essence of plaintiff's claim was that she has been unlawfully prevented from pursuing her profession at the Highland District Hospital, a public hospital in Hillsboro, Ohio, having been denied hospital staff privileges in violation of her right to pro-

* Hon. Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation.

cedural due process under the Fourteenth Amendment and in violation of her right to be free from discrimination on account of her sex and ethnic and religious backgrounds.

An earlier due process claim was pursued in the Ohio courts, and resulted in the reopening of her application for reappointment to the medical staff and a full due process hearing on her eligibility. After that hearing, the Highland District Hospital Board of Governors recommended that appellant not be reappointed for the year commencing July 1, 1976. The district court held that because Dr. Lustgarten could have presented all of her civil rights claims during the state administrative appeal of her 1976 termination, principles of *res judicata* barred her from raising them anew in the district court.

Our circuit has previously applied the doctrines of *res judicata* and collateral estoppel to bar a 42 U.S.C. § 1983 action, based on a final judgment of the Supreme Court of Ohio. *Coogan* v. *Cincinnati Bar Ass'n.*, 431 F.2d 1209, 1211 (6th Cir. 1970) (per curiam). *Accord, Tonti* v. *Petropoulous*, 656 F.2d 212, 216 (6th Cir. 1981). This court is of the opinion that Dr. Lustgarten's procedural due process claim was fully litigated during her administrative appeal process in the Ohio courts, a process which culminated in the dismissal of her appeal by the Ohio Supreme Court "for the reason that no substantial constitutional question" existed, and in the United States Supreme Court's denial of her petition for writ of certiorari. Collateral estoppel therefore bars relitigation of appellant's procedural due process claim.

This court is also convinced that Dr. Lustgarten could have raised her claims of sex and religious discrimination in the Ohio Common Pleas Court during her administrative appeal of the hospital board's decision. Ohio Rev. Code § 2506.04. On the facts of this particular case, she

also could have introduced new evidence in the Common Pleas court, evidence not adduced at her administrative hearing before the hospital board, and cross-examined witnesses who testified against her at the board hearing, all to prove the discrimination claims which she seeks to raise for the first time in federal court. *See* Ohio Rev. Code §§ 2506.03 (E) , 2506.04. Dr. Lustgarten's civil rights claims therefore could have been fully and fairly litigated in her state administrative appeal. These claims are now barred by the doctrine of *res judicata.*

Dr. Lustgarten's argument that certain of her equal protection claims arose after the 1976 termination hearing and administrative appeal process, and therefore cannot be barred by *res judicata,* is without merit. While she does allege certain facts based on events occurring after her termination, there is nothing in her complaint and supplemental complaint which connects these events to any alleged sex, ethnic, or religious discrimination by the defendants.[1] A post-1976 equal protection claim is therefore not stated.

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[1] The "post-1976 facts" alleged by the appellant are contained in paragraphs 67, and 76-92 of her complaint. These allegations relate to the failure of the hospital board to take any action on Dr. Lustgarten's 1978 and 1979 applications for appointment to the medical staff. While this board inaction may have been influenced by the actions of defendants Harewood and Ayres, *see* Complaint at ¶¶ 67, 90, there is no allegation anywhere in the Complaint that the board's inaction or the actions of any of the defendants after 1976 were influenced by or had anything to do with Dr. Lustgarten's sex, ethnic background or religion.

The only direct allegation of discriminatory motivation on the part of the defendants is contained in paragraph 4 of the complaint, which states that the defendants' campaign against Dr. Lustgarten was conducted "in order to serve certain interests of the conspirators," one interest being "the fostering of bias and prejudice and exploitation of class-based discrimination as hereinafter set forth." Yet the only specific allegation of "fostering of bias and prejudice . . ." by any defendant was

Finally, Dr. Lustgarten's only post-1976 due process claim, *see* Complaint at ¶ 85, must necessarily fail because she had no property interest in a position on the medical staff at the hospital after her 1976 termination. That termination validly extinguished any property interest she may have had. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Dr. Ayres' "cultivation" of one medical staff member's "notorious ethnic prejudice" against appellant to obtain that staff member's vote to recommend to the hospital board that Dr. Dustgarten not be reappointed *in 1976*. Complaint at ¶ 47.

Beyond this, the complaint indicates only that Dr. Ayres was motivated by a desire to maintain a monopoly over the anesthesia practice at the hospital, *see* Complaint at ¶ 36, and out of a personal animosity toward the appellant, *e.g.*, Complaint at ¶ 51, and that the hostility between Dr. Lustgarten and defendant Dr. Raffinan was rooted in serious differences of professional opinion, *see* Complaint at ¶ 40.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-78-694

BARBARA LUSGARTEN, M.D.,

Plaintiff,

v.

DAVID AYRES, M.D., et al.,

Defendants.

ORDER

(Filed October 7, 1980)

This matter is before the Court upon motion for summary judgment by defendants David S. Ayres, M.D., Paul Terrell, M.D., Jose Raffinan, M.D., Maria Raffinan, M.D., Highland District Hospital, present and former members of the Board of Governors of Highland District Hospital, and present and former Administrators of Highland District Hospital; pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The facts that gave rise to this dispute are as follows: On May 4, 1976 a quorum of the entire medical staff of Highland District Hospital voted eight-to-four in favor of a motion denying staff privileges to Dr. Barbara Lusgarten. Two days later Dr. Lusgarten was informed that the medical staff did not recommend her reappointment. In response Dr. Lusgarten notified the medical staff of her

desire for a hearing before the Executive Committee of the medical staff. And on May 17, 1976, Mr. Lustgarten filed an action in the Court of Common Pleas of Highland County, Ohio, Case No. CIV-171, in which she sought to enjoin the Board of Governors from taking any action on the recommendation of the medical staff and for an adjudication of their rights and her status under the bylaws of the medical staff of the hospital.

The Court of Common Pleas entered a judgment permitting the Board of Governors to receive the recommendation of the medical staff relating to the reappointment of plaintiff. It also ordered the Board to conduct a due process hearing and to render a decision thereon, on or before June 1, 1976. The hearing before the Board of Governors consisted of ten sessions. The Board then voted not to renew the privileges of Dr. Lusgarten.

An appeal of the Board's decision was taken to the Common Pleas Court and a motion for stay pending review was granted. In December, 1976, the Court of Common Pleas denied the appeal and dissolved the stay. An appeal was taken and on November 9, 1977, the Court of Appeals for Highland County affirmed the decision of the Court of Common Pleas. The Supreme Court of Ohio overruled plaintiff's motion to certify the record and on October 2, 1978, the Supreme Court of the United States denied the plaintiff's petition for Writ of Certiorari.

Plaintiff now brings this action under 42 U.S.C. § 1983 and asserts a right of recovery for actions of the defendants, under color of state law, to deprive her without due process of law of federally protected rights she has in the practice of medicine on the medical staff of a public hospital; asserts a right of recovery under 42 U.S.C. § 1985 (3) for concerted acts of the defendants to implement invidious discrimination against plaintiff because she is female

and because she is Jewish; and asserts a right to recover double damages under § 1331.01, *et seq.*, Ohio Revised Code against defendants who conspired to monopolize the administration of anesthesia at Highland District Hospital.

Rule 56 (c) permits the Court to grant summary judgment when there is no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); *Tee-Pak, Inc.* v. *St. Regis Paper Co.*, 491 F.2d 1193, 1195 (6th Cir. 1974). In deciding a motion for summary judgment, the movant has the burden of showing conclusively that there exists no genuine issue as to any material fact and the evidence together with all inferences to be drawn therefrom must be read in a light most favorable to the party opposing the motion. *Smith, Et al.* v. *Hudson, Et Al.*, 600 F.2d 60 at 63 (6th Cir. 1979); citing *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970); *United States* v. *Diebold*, 369 U.S. 654, 655 (1962); *Ott* v. *Midland Ross Corp.*, 600 F.2d 24 (6th Cir. 1979). Applying this standard, defendants' motion for summary judgment will be granted.

Under the doctrine of *res judicata* a judgment in one suit precludes later suits between the same parties on the same causes of action. The parties are precluded from later litigating any issue that was raised or might have been raised in the prior action. *Cromwell* v. *County of Sac*, 94 U.S. 351 (1877); *International Ass'n of Machinists*, 350 F.2d 512 (6th Cir. 1965). As to the same cause of action, a final judgment on the merits by a court of competent jurisdiction "constitutes an absolute bar to a subsequent action." It is a finality as to the claim or demand in controversy, including parties and those in privity with them, not only as to every matter which was offered and

received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. *Cromwell* v. *County of Sac,* supra at 352.

In the case at bar, Dr. Lusgarten could have presented her § 1983 and § 1985 actions in state court or alternatively could have brought her due process claim in Federal Court. Her § 1331 action could have been brought concurrently with her prior due process claim in state court or appended to a federal due process claim. However, she failed to present these claims and will be barred from relitigating those issues which previously should have been presented.

The argument has been raised that *res judicata* should not apply to a 42 U.S.C. § 1983 and § 1985 action presented in state court which is sought to be relitigated in Federal Court. However, the United States Court of Appeals for the Sixth Circuit held in *Coogan* v. *Cincinnati Bar Association,* 431 F.2d 1209, 1211 (6th Cir. 1970), that in a Civil Rights Act case, "the final judgment of the Supreme Court [of Ohio] is conclusive and Coogan is precluded by the doctrine of *res judicata* from relitigating not only the issues which were actually involved in the disbarment proceeding but also the issues which . . . might have [been] presented." We are bound by that determination.

Accordingly, defendant's motion for summary judgment will be GRANTED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO – WESTERN DIV.

Civil Action File No. C-1-78-694

Barbara Lustgarten, M.D.,

Plaintiff,

vs.

David S. Ayres, et al.,

Defendants.

JUDGMENT

(Filed October 7, 1980)

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the defendants' Motion for Summary Judgment should be and is hereby GRANTED, *res judicata*.

Dated at Cincinnati, Ohio, this 7th day of October, 1980.

JOHN D. LYTER
Clerk of Court

/s/ ANNE CATANZARO
Deputy Clerk

IN THE COURT OF COMMON PLEAS
OF HIGHLAND COUNTY, OHIO

Case No. 76 CIV 171

BARBARA LUSTGARTEN, M.D.,
Plaintiff,

v.

FRANK C. BAKER, Administrator, et al.,
Defendants.

JUDGMENT ENTRY

(Filed May 26, 1976)

This cause came on on the Plaintiff's motion for preliminary injunction, and upon due consideration thereof and the agreement of counsel and of the Plaintiff, Barbara Lustgarten, M.D., Defendants Frank C. Baker, David S. Ayres, T. J. Belleson, Richard Bowman, Richard L. Griffth, James Gibbs, Wendell Harewood, George Hastings, and Ernest Williamson, it is ordered that the Board of Governors of the Highland District Hospital may receive and hear the recommendations of the Medical Staff and the Executive Committee of the Medical Staff relating to the Reappointment of the Plaintiff, Barbara Lustgarten, M.D., to the Medical Staff of the Highland District Hospital for the year beginning July 1, 1976 and ending June 30, 1977.

It is further ordered that said Board of Governors shall conduct a due process hearing and render a decision thereon on or before July 1, 1976. And the Court finds that

the Plaintiff Barbara Lustgarten has waived all other procedures relating to her reappointment to the Medical Staff of the Highland District Hospital as established by the By-Laws of the Highland District Hospital and the Medical Staff of the Highland District Hospital, as such By-Laws now exist.

The Court further orders that the decision of the Board of Governors of the Highland District Hospial relating to the application for reappointment to the Medical Staff by the Plaintiff herein shall be final and not subject to review. This order supersedes the prior order of this Court.

It is further ordered that the Plaintiff shall pay half of the costs herein, and that the Defendants shall pay the remaining one-half of said costs.

ENTER:
/s/ JOHN C. BACON
Judge, by assignment

APPROVED:

/s/ CONRAD A. CURREN
Attorney for Plaintiff
/s/ ROBT. B. McMULLEN, JR.
Attorney for Defendants
/s/ BARBARA LUSTGARTEN, M.D.
/s/ RICHARD L. GRIFFITH
/s/ E. W. WILLIAMSON
/s/ RICHARD S. BOWMAN
/s/ T. J. BELLESON
/s/ GEORGE HASTINGS
/s/ GEORGE D. WILKIN
/s/ JAMES S. GIBBS
/s/ FRANK C. BAKER
/s/ DAVID S. AYRES
/s/ WENDELL L. HAREWOOD

IN THE COURT OF COMMON PLEAS OF
HIGHLAND COUNTY, OHIO

NO. 76 CIV. 171

BARBARA LUSTGARTEN, M.D.
Plaintiff,

vs.

FRANK C. BAKER, ADMINISTRATOR, ET AL.,
Defendants.

JUDGMENT ENTRY

(Filed December 22, 1976)

This matter having come on for hearing on Plaintiff's appeal from the decision and order of the Board of Governors of the Highland District Hospital made June 30, 1976, the arguments of counsel and the evidence, and upon due consideration the Court finds that the presence of Dr. David Ayres on the Board of Governors during the hearing previously ordered by the Court did not violate the plaintiff's right to due process; that the plaintiff's right to procedural and substantive due process was in all respects observed and protected by the defendants; and, that the record of said hearing provides ample evidence to support the decision of the Board of Governors of said hospital.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff's Appeal be and the same is here-

by denied and that the previous order of August 31, 1976, staying action of the Board of Governors of said Hospital be and the same hereby is dissolved.

Cost of this action shall be paid by the plaintiff.

ENTER:

/s/ JOHN C. BACON
Judge, By Assignment.

IN THE COURT OF COMMON PLEAS OF
HIGHLAND COUNTY, OHIO

Case No. 76 CIV 171

BARBARA LUSTGARTEN, M.D.,
Plaintiff,

vs.

FRANK C. BAKER, ADMINISTRATOR,
BOARD OF GOVERNORS, HIGHLAND
DISTRICT HOSPITAL, ET AL.,
Defendants.

JUDGMENT ENTRY

(Filed January 12, 1977)

This day this cause came on to be heard upon the motion heretofore filed herein for stay of execution of the

judgment and order of this Court made and entered on the 22nd day of December, 1976.

Upon consideration of the record and arguments of counsel the Court finds that said motion is not well taken and ought to be and the same is hereby overruled.

Further, upon suggestion of counsel for the Defendants, and it appearing to the Court that the motion heretofore filed herein for findings under Civil Rule 52 had not been acted upon by the Court, the Court now finds that said motion is not well taken and the same is hereby overruled.

ENTER THIS 11th day of January, 1977.

.....
JUDGE
BY ASSIGNMENT

APPROVED:

.....
CONRAD A. CURREN
ATTORNEY FOR PLAINTIFF

.....
JOSEPH JORDAN
ATTORNEY FOR PLAINTIFF

.....
FREDERICK J. BUCKLEY
ATTORNEY FOR DEFENDANTS

COURT OF APPEALS, HIGHLAND COUNTY, OHIO

No. 334

BARBARA LUSTGARTEN, M.D.,

Plaintiff-Appellant,

vs.

FRANK C. BAKER, ADMINISTRATOR, ET AL.,

Defendant-Appellee.

OPINION

(Filed November 9, 1977)

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COUNSEL FOR APPELLEE:

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Buckley & Miller, Frederick J. Buckley, 145 North South Street, Box 311, Wilmington, Ohio 45177

GREY, J:

This is an appeal from the Highland County Court of Common Pleas. The facts in the case are as follows: Appellant, Dr. Barbara Lustgarten, was admitted to practice as a physician at the Highland District Hospital. At a medical staff meeting a recommendation was made that Dr. Lustgarten's staff privileges not be renewed for the year July 1, 1976 to June 30, 1977. Lustgarten then brought an action in the Highland County Court of Common Pleas. That court ordered that the Board of Governors of the Highland District Hospital conduct a hearing according to the rules of due process regarding Lustgarten's denial of staff privileges. A hearing was conducted over a period of several days wherein witnesses were heard both for and against Dr. Lustgarten. At the conclusion of the hearing the Board met to consider Dr. Lustgarten's case and voted 9 to 6 not to grant Dr. Lustgarten's reappointment to the hospital. From that administrative decision an appeal was taken to the Common Pleas Court. The Common Pleas Court upheld the decision of the Board of Governors and it is from the decision of that court that this appeal was taken.

The record in this case is voluminous and the briefs of counsel are quite lengthy. Each side has thoroughly researched relevant law. From a reading of the briefs of the Appellant and the Appellee we find that there are certain rules of law applicable to this case upon which there is no dispute. We now set out those principles.

A Doctor has no constitutional right to practice medicine in a public hospital. *Hayman* v. *Galveston,* 273 U.S. 414, 47 S.Ct. 363 (1927). Once having been admitted to the staff of a hospital a physician has a protected right in maintaining that status and such status may not be

revoked arbitrarily or capriciously. *Foster* v. *Mobile County Hospital,* 398 F.2d 227 (5th Cir. 1968); *Sams* v. *Ohio Valley General Hospital,* 413 F.2d 826 (4th Cir. 1969).

The physician is entitled to due process of law. *Klinge* v. *Lutheran Charities Assoc. of St. Louis,* 523 F.2d 56 (8th Cir. 1975). Due process means that a physician is entitled to reasonable notice of the charges against him and a reasonable opportunity to defend against those charges. *Christhilf* v. *Annapolis Emergency Hosp. Association,* 496 F.2d 174 (4th Cir. 1974). The doctor has the right to present witnesses and other evidence to rebut those charges and the administrative panel, in deciding those issues, must be free of bias or prejudice. *Gibson* v. *Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.ed 2d 488 (1973); *Wall* v. *American Optometric Association,* 379 F.2d 175 (Ga. 1974) affd. 418 U.S. 888. Due process, however, does not require a full blown judicial trial. *Duffield* v. *Charleston Area Medical Center, Inc.,* 503 F.2d 512 (4th Cir. 1974); *Christhilf* v. *Anapolis Emergency Hospital Assoc.,* supra.

With these general rules in mind we now turn to Appellant's Assignments of Error to determine if the trial court erred in upholding the decision of the Board. The standard to be applied by the Common Pleas Court in reviewing the decisions of Administrative Boards is set out in *Andrews* v. *Board of Liquor Control,* 164 Ohio St. 275 (1955) which holds that the court must appraise all evidence offered at the hearing and such other evidence as it may admit. It is not a trial de novo but, the reviewing court must look into the probative value of the evidence, the credibility of the witnesses, and the weight to be given the various items of evidence. Finally, a reviewing court must decide whether the decision of the agency is supported by reliable, substantive and probative

evidence. *Cincinnati Bell, Inc.* v. *Glendale,* 42 Ohio St.2d 368 (1975). The standard of the Appellate Court in reviewing the decision of the Common Pleas Court is set out in *119.12* O.R.C. See also *Quinn* v. *Board of Real Estate Examiners,* 104 O.App. 316 (1956).

Assignment of Error No. 1 is as follows:

> *"The trial court erred in deciding that the participation by Dr. David Ayres on the hospital board in the hearing which revoked Plaintiff's privileges did not deny Plaintiff due process of law."*

Dr. David Ayres is a doctor practicing at the Highland District Hospital. He is also a member of the Hospital Board of Governors. Appellant objected to the presence of Dr. Ayres on the Board on the grounds that he was biased against the Appellant. The Board overruled that objection and permitted Dr. Ayres to sit at the hearing. Dr. Ayres did not participate in the vote taken by the Board although he did participate in its deliberations. Appellant also argued before the Common Pleas Court that since both Dr. Lustgarten and Dr. Ayres were the two physicians who did most of the anesthesia work at Highland District Hospital, Dr. Ayres had a direct financial interest in the outcome of the Board's decision. It might have been better had Dr. Ayres not participated and he himself apparently felt this possible conflict of interest as evidenced by his declining to vote. We dc not feel, however, that his participation was such as to constitute a denial of due process and/or prejudicial error.

Appellant relies on *Gibson* v. *Berryhill,* supra and *Wall* v. *American Optometric Association,* supra, but these cases are distinguishable. In both cases the entire administrative hearing panel are made up of members whose interests were hostile to the entire class of persons subject

to the Board's inquiry. In this case Dr. Ayres was only one of 16 members of th Board of Governors and the vote against Dr. Lustgarten was 9 to 6. Appellant argues that Dr. Ayres presence on the Board permitted him to be in a position to affect the Board as a member in its deliberations. Essentially, Appellant's argument is that Dr. Ayres was both the accuser and a member of the Board hearing the matter. We note that many administrative panels may initiate investigations and charges and rule on those very charges. Cf. *Board of Liquor Control* 4301.27 O.R.C.; *Pharmacists* 4729.26, 16 & 17; *Nurses* 4723.28. Indeed a hospital Board of Governors under *513.16 O.R.C.* is authorized to remove its own members, being prosecutor, judge and jury of itself. Each of these decision making bodies, however, are subject to review by the courts under the standards of *Anderson,* supra and *O.R.C. 119.12.* A person at an adjudicatory administrative hearing is entitled to due process but is not entitled to a full scale judicial trial. *Duffield* v. *Charleston Area Medical Center, Inc.,* 361 F.Supp. 298, affd. 503 F.2d 512 (1974). We do not find the presence of Dr. Ayres on the panel as prejudicial.

Appellant also argues in her brief that Dr. Ayres had a financial interest in the outcome of the hearing. We note that at the hearing itself Dr. Ayres presence on the Board was objected to as follows:

> *"MR. CURREN: For the record, we move the Board to exclude Dr. Ayres from participating in this hearing, since we feel that in the interest of due process, he cannot fairly sit both as an accuser and as a Member of the Board. If he is not permitted to testify as a witness, we feel probably if it were a reverse, he could testify as a witness and not sit as a member of the Board. We do not object to this, and we feel*

that he should voluntarily step down as a member of this Board concerning this one particular question. Nothing else. (Emphasis supplied.)

Only on argument before the Common Pleas Court was the issue of Dr. Ayres financial interest raised for the first time. No evidence was introduced at the hearing or before the Court of Common Pleas to indicate the extent of Dr. Ayres financial interest other than both he and Dr. Lustgarten did anesthesia work. We would therefore have to infer that Dr. Ayres was seeking this kind of work and would have the time to do it. This argument is the classic inference based on an inference and cannot hold water. From the foregoing we find plaintiff's first assignment of error is not well taken.

Plaintiff's second assignment of error is as follows:

"The trial court erred in deciding that the proceedings of the Board of Highland District Hospital at the hearing on the revocation of plaintiff's staff privileges did not violate due process of law with respect to adequate notice of the charges and an opportunity to prepare and present her case."

Appellant's second assignment of error is a claim of the denial of due process and is treated in Appellant's brief as four separate items. One is the lack of reasonable notice of the charges, the second is adequacy of time to prepare cases, and the third is the right to cross-examine witnesses and the fourth is Appellant's access to hospital records. In order to examine these four items it is necessary to briefly review the proceedings. On May 4, 1976 at a medical staff meeting Dr. Lustgarten's colleagues voted 8 to 4 against her reappointment to the Highland County Staff, effective July 1, 1976. In the

normal course of hospital routine this recommendation would have been presented to the Executive Committee of the medial staff and then to the Board of Governors. The Hospital By-laws, particularly Article 5, Section 3, dealt with the reappointment process. Article 8 of the By-laws dealt with the hearing and review procedures which related to notice, counsel and other due process requirements. It should be noted that on June 7, 1976 the Executive Committee of the Medical Staff considered the matter and found that the charges against Dr. Lustgarten were broad and generalized and without specific instances to support the charges. Prior to this, however, on May 17, 1976 Dr. Lustgarten filed a Complaint in the Common Pleas Court seeking a preliminary injunction and restraining order against the Administrator and Board of Governors of the Highland District Hospital. The restraining order was granted prohibiting the Administrator and the Board of Governors from taking any action upon the recommendation of the medical staff. On May 26, the court removed the prior restraining order and granted a preliminary mandatory injunction ordering the Board of Governors to conduct a due process hearing and to render a decision on Dr. Lustgarten's appointment on or before July 1st. The court also permitted the Board of Governors to hear and receive the recommendations of the medical staff and the executive committee of the medical staff.

Dr. Lustgarten prevailed in obtaining the relief she sought. We think it is significant that in a request for hearing before the Board of Governors Dr. Lustgarten did not seek a remedy in the nature of a Bill of Particulars nor was there any request that there be any specifications or charges. Dr. Lustgarten sought, in her complaint:

"* * * * *an adjudication of the rights and status of*

*the Plaintiff under the by-laws of the Medical Staff of the Highland District Hospital * * * *"*

She also specifically sought an injunction to prevent the Board from taking any action on the recommendation of May 4. The Medical Staff and Hospital By-Laws would have been provided for specific notice of any charges. Appellant's action sought to by-pass this procedure and to have her status determined by the Board of Governors, after an inquiry by them. Such a hearing would constitute a general inquiry into the subject matter of Dr. Lustgarten's status. Having sought such relief and having prevailed, Appellant cannot now claim that she was without adequate notice. The hearing was for the purpose of determining her status and for consideration of a renewal of her staff privileges. Appellant obtained the relief she sought. If the order of the trial court was overly broad, if Appellant was unaware as to the nature and extent of the matters to be considered at the hearing, she had an adequate remedy at that time in the trial court.

Appellant also argues that there was not adequate time in which to prepare a defense. Appellant's position is this: Having sought to have the matter brought before the Board of Governors as soon as possible, she now claims on appeal that she was without adequate time to prepare her defense. No request for a continuance was made before the Court or before the Board. Any failure of the Board to grant additional time was the result of Appellant's insistence on an immediate hearing, and if it is error it is invited error.

The third item raised in Appellant's brief regarding the right to due process is the right to cross-examine adverse witnesses. Appellant argues in her brief that the right of a witness to refuse to answer a question made a "sham"

of Appellant's right to cross-examine. In *56 O.Jur.2d, Witnesses, Sec. 24,* we have the following language:

> *"* * * in Ohio it is held that a witness, as well as a party, may object to the relevancy of competency of the evidence sought to be extracted from him, and may rightfully refuse to answer where the questions are not pertinent to the matter * * *. However, a witness cannot be allowed to determine by himself whether a question is relevant or irrelevant, since such a determination rests with the court."*

The Board of Governors, acting as the trier of facts in this case, permitted witnesses to decline to answer questions if they preferred not to and the Board did not compel any witness to answer any question which he declined. Appellant further objects to the admission of hearsay evidence which was admitted at the Board hearing. There is no requirement that an administrative panel must follow the Rules of Evidence. *Duffield,* supra and *Christhilf,* supra. It should be noted that the Board of Governors is a creature of statute and that its members are laymen and not jurists or lawyers. In the world of laymen hearsay is a common source of knowledge and information. It is commonly accepted to be less credible than testimony from personal knowledge but is nonetheless ordinarily relied on by the average person.

The exclusionary rules of evidence and the underlying reasons for them are the result of centuries of legal experience and scholarship. To a person trained in the law they seem reasonable and proper. One would not expect laymen to understand them or the reasons for their existence nor would one expect laymen to attempt to arrive at the truth of any matter by limiting the scope of their inquiry. Since the statute created the Board of Governors to be composed of ordinary persons it must be

presumed that the legislature intended that in their decision making capacity the Board shall operate the procedures followed by ordinary persons. The Board was genuinely interested in getting at the truth and admitted all sorts of evidence, including hearsay, from both sides. The Board subpoenaed no witnesses but permitted any interested person to come and tell his story. Under the rules of evidence such a procedure might be questioned, but a reading of the entire transcript indicates that the Board met acceptible standards to insure due process to both sides of the dispute.

The fourth item claims that Appellant was denied due process because she was denied access to hospital records. It is clear that the decision of the Board of Governors was based on factors other than Dr. Lustgarten's medical competency and we fail to see how access to medical records would have established any matter other than Dr. Lustgarten's competency. The record is clear on the question of Dr. Lustgarten's competency as a doctor and was hardly questioned by any witness at the hearing. We fail to see, nor does Appellant attempt to offer, what facts might have been established had Appellant been given access to these privileged records. The cases cited in Appellant's brief are distinguishable. Those cases dealt with such questions as unjustified surgery. Access to hospital records would be relevant and necessary to rebut matters raised. In this case there was no issue as to medical procedures.

Based on the foregoing we find the Second Assignment of Error is not well taken and the same is overruled.

Appellant's Third Assignment of Error is as follows:

> *"The trial court erred in deciding that the evidence at the hearing of the Board of Highland District Hos-*

pital established grounds for revoking the staff privileges of Plaintiff."

Essentially, this is a claim that the decision of the Board is against the weight of the evidence. The rule to be applied in examining decisions of administrative hearings is whether the record demonstrates if there is sufficient, substantive, reliable and probative evidence to justify the decision of the Board. *Andrews* v. *Board of Liquor Control,* supra. We would like to apply that standard in the instant case.

We begin by noting that a modern hospital is staffed by many highly trained professionals. A well-functioning hospital is made up not only of doctors but many subspecialists, including medical technologists, surgical nurses, physical therapists, inhalation therapists. There is probably no civilian occupation where subordinates are required to so exactly obey, to so unquestionably adhere to the dictates of their superiors, as medical staff personnel are required to obey doctors, but they are not minions and lackeys. These persons are qualified professionals, specially licensed within their limited sub-specialties and are entitled to be treated with respect. The record shows that the Appellant engaged in, among other things, racial slurs against a fellow doctor, badgering and berating behavior towards members of the hospital staff other than doctors, and abusive conduct in general. It should be remembered that the management of the hospital is given to the Board of Governors. If the Board of Governors will not protect the members of the staff from such abusive conduct by a fellow professional, who will? Appellant cites the case of *Rosner* v. *Eden Township District Hospital,* 25 Cal. Rptr. 551, 375 P.2d 431 (1962) and *McElhinney* v. *William Booth Memorial Hospital,* 554 S.W.2d 216

(1976). Both cases are readily distinguishable from the matters presented in this case. In both those cases the doctors on the medical staff were seeking to have one of their fellows removed, particularly because of professional criticism. This is not the case here. Where a Doctor on the staff will not accord his fellow doctors and other staff members the minimum standard of human courtesy and respect which they are entitled to by virtue of their positions and where this affects the efficient operation of the hospital the governing board is justified, if not required, to step in and remove that doctor. To be sure, such action is not to be taken lightly, and petty personality conflicts are not to be magnified out of proportion but whether a problem is a personality clash or serious administrative difficulty, is to be decided by the Board and if the Board finds it necessary to act, the courts will not set aside that decision if the record discloses it is supported by reliable evidence.

The record demonstrates there were other grounds which were considered on the issue of reappointment to the staff, e.g. the refusal to do emergency room duty. We note that Dr. Lustgarten presented evidence to justify her refusal but it was for the Board to determine the sufficiency of that justification. The record disclosed that Dr. Lustgarten engaged in the altering of medical records, specifically the use of some sort of correcting fluid to change a hospital record. Such conduct violates the well-established medical procedure. There was the matter of Dr. Lustgarten's residence in the maternity ward when her house burned down which jeopardized the hospital's certification. It should be noted that here again Dr. Lustgarten presented evidence to justify her behavior. As noted before, the hearing lasted several days and the transcript was hundreds of pages long. We shall not attempt to consider

all of the matters raised. We find, however, that a reading of the record demonstrates there was sufficient probative evidence to justify the decision of the Board. Assignment of Error No. 3 is therefore overruled.

Appellant's Assignment of Error No. 4 is as follows:

> *"The trial court erred in affirming the decision of the Board."*

The standards to be used in an appeal from an Administrative Agency are clearly set out in *Andrews* v. *Board of Liquor Control,* supra, where it states that the court must appraise all evidence as to the credibility of witnesses, probative character of the evidence and the weight to be given from it and if from such consideration it finds that the Board's order is supported by reliable, probative and substantial evidence the court shall affirm the order. Our review of the transcript of the hearing indicates that there is in fact such reliable, probative and substantial evidence to justify, if not compel, the Court of Common Pleas to confirm the order of the Board. Assignment of Error 4 is overruled.

This court affirms the decision of the Court of Common Pleas.

JUDGMENT AFFIRMED

Abele, P. J. & Stephenson, J., concur.

COURT OF APPEALS, HIGHLAND COUNTY, OHIO

Case No. 334

GARBARA LUSTGARTEN, M.D.,
Plaintiff-Appellant,

vs.

FRANK C. BAKER, ADMINISTRATOR, ET AL.,
Defendant-Appellee.

JOURNAL ENTRY

Judgment of Affirmance

(Filed December 5, 1977)

Upon consideration of the record and assignments of error on this appeal on questions of law, the court fails to find any error on the record prejudicial to the rights of appellant in the judgment and proceedings in the court below and the judgment is therefore affirmed, at appellant's costs.

It is ordered that a mandate issue to the court below for enforcement of the judgment. The court certifies, however, that reasonable grounds existed for this appeal.

/s/ HARRY E. ADELE
Presiding Judge

APPROVED:

/s/ ROBERT E. MANLEY
Counsel for Appellant

/s/ FREDERICK J. BUCKLEY, per JAMES S. MILLER
Counsel for Appellee

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,	)	1978 TERM
	)	To wit:
City of Columbus.	)	March 17, 1978

No. 78-18

BARBARA LUSTGARTEN,

Appellant,

vs.

FRANK C. BAKER, ADMR., ET AL.,

Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
for Highland County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled. O'Neill, C. J., not participating.

COSTS:

Motion Fee, $20.00, paid by Robert E. Manley.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....

..... Clerk

..... Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	)	1978 TERM
	)	To wit:
City of Columbus.	)	March 17, 1978

No. 78-18

BARBARA LUSTGARTEN,

Appellant,

vs.

FRANK C. BAKER, ADMR., ET AL.,

Appellees.

APPEAL FORM THE COURT OF APPEALS
for Highland County

This cause, here on appeal as of right from the Court of Appeals for Highland County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Highland County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

SUPREME COURT OF THE UNITED STATES

No. 77-1771

Barbara Lustgarten,

Petitioner,

v.

Frank C. Baker, etc., et al.

(Filed October 2, 1978)

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of Ohio, Highland County, No. 334.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Court of Appeals of Ohio, Highland County.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

October 2, 1978

[CERTIFICATION OMITTED]

Opposition

1

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FILED
MAY 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1846

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BARBARA LUSTGARTEN, M.D.,
Petitioner,

vs.

DAVID S. AYRES, M.D., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS, DAVID S. AYRES' AND PAUL W. TERRELL'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the doctrines of *res judicata* and collateral estoppel bar a party from asserting in the district court, civil rights claims which were, or might have been, presented in prior state proceedings in a forum chosen by such party, and in which such party fully, without reservation, and with the benefit of counsel litigated her constitutional claims.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1846

BARBARA LUSTGARTEN, M.D.,
Petitioner,

vs.

DAVID S. AYRES, M.D., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS, DAVID S. AYRES' AND PAUL W. TERRELL'S BRIEF IN OPPOSITION

Respondents, David S. Ayers and Paul W. Terrell, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Order of the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT OF THE CASE

STATE COURT PROCEEDINGS

The factual background of this matter extends to June 25, 1974. On that date, Petitioner filed an action sounding in defamation against Respondents Ayres and Terrell

in the Court of Common Pleas of Highland County, Ohio. Petitioner, who administers anesthesia, therein alleged that Drs. Ayres and Terrell had maliciously defamed her for the purpose of injuring her good name and "to curtail her economic success in the practice of her profession". That action terminated on May 7, 1976, in summary judgment for the defendants. Petitioner did not appeal.

On May 4, 1976, the medical staff of Highland District Hospital voted to recommend to the board of governors the non-reappointment of Petitioner for the 1976-1977 staff year. Instead of pursuing her administrative remedies before the medical staff and the hospital board of governors, Petitioner filed suit in the Court of Common Pleas of Highland County, Ohio, against the hospital administrator and the board of governors, seeking to enjoin the board from acting on the recommendation of the medical staff.

On May 26, 1976, the court issued an order executed by all parties and counsel, including Petitioner and her attorney, which granted Petitioner's request for an accelerated hearing before the board of governors (Appendix pp. 10a-11a). The board of governors conducted the required hearing in ten individual sessions. The record of this hearing exceeds 700 pages in length, and includes the testimony of 18 pro-Lustgarten or "neutral" witnesses. Petitioner was permitted to testify, and was represented by counsel who called favorable witnesses and was permitted to cross-examine adverse witnesses.

Following deliberation, the board voted against approval of Petitioner's application for admission to the medical staff for the year commencing July 1, 1976 and ending June 30, 1977. Respondent Ayres, a physician member of the board at that time, abstained. No conclusions of fact were issued in support of the decision.

On appeal under Ohio Revised Code § 2506.01 to the Court of Common Pleas of Highland County, Ohio, the decision and order of the board were affirmed. (Appendix pp. 12a-13a). Petitioner did not seek, under the provisions of Ohio Revised Code § 2506.03 (E), to offer any additional evidence or cross-examine adverse witnesses.

Further appeal was made to the Court of Appeals for the Fourth Appellate District. The court of appeals found that Petitioner had not been denied due process and that "there is in fact such reliable, probative and substantive evidence to justify, *if not compel*, the court of common pleas to confirm the order of the board," (emphasis added), and the judgment was affirmed. (Appendix pp. 15a-17a, 28a). The court observed, *inter alia*, that having received the relief she sought, namely an expedited hearing as well as an injunction to prevent board action on the medical staff recommendation, Petitioner could not be heard to complain of inadequate notice or time to prepare a defense.

With regard to the participation of Ayres, the court noted that he had abstained from any vote, and that there was no evidence that he had any direct financial interest in the outcome of the board's decision, even though Petitioner and Dr. Ayres accounted for most of the anesthesia work at the hospital.

Petitioner's Motion to Certify the Record to the Supreme Court of Ohio was overruled, and her appeal to the court was dismissed by order of March 17, 1978. (Appendix p. 29a). Thereafter, this Court denied Petitioner's Petition for Writ of Certiorari on October 2, 1978. (Appendix p. 31a).

FEDERAL COURT PROCEEDINGS

Less than one month after certiorari was denied, Petitioner brought this action under 28 U.S.C. § 1334, alleging that Respondents and others unlawfully conspired to deny her due process, discriminate against her on the basis of sex and ethnicity, and monopolize the practice of anesthesia at Highland District Hospital, all in violation of the Fourteenth Amendment, 42 U.S.C. § 1983 and § 1985, and Ohio Revised Code § 1331.01.

On October 7, 1980, the district court entered summary judgment in favor of all Respondents for the reason that Petitioner had fully litigated her civil rights claims in the state forum which she had chosen, and that *res judicata* barred further proceedings.[1]

The United States Court of Appeals for the Sixth Circuit affirmed, holding that collateral estoppel and *res judicata*

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[1] Petitioner asserts that they were "agreed" factual controversies which were ignored by the district court. This is untrue and is a deliberate distortion of the district court's Final Pre-Trial Order procedures.

Under those procedures, each counsel may include in the Final Pre-Trial Order, all issues *he* deems relevant, without regard to their validity. Opposing counsel have no right to exclude these issues. Thus, their appearance in the Final Pre-Trial Order does not indicate "agreement" to them.

Petitioner's position appears to be that she is entitled to defeat a well-taken motion for summary judgment by merely asserting that there are factual "issues" submitted, even though on their face, they are immaterial to the true questions before the court. This theory would effectively strike the words "genuine" and "material" from Rule 56(c) of the Federal Rules of Civil Procedure.

The district court below had before it the entire record of previous proceedings, all relevant entries, and the opinion of the state appellate court. This was more than sufficient information upon which the district court was able to make its determination "as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

barred Petitioner's pre-1976 due process and equal protection claims. It further held that Petitioner had no property right in her staff position after June 30, 1976 and could not, therefore, have suffered a denial of due process after that date. Finally, the court held that Petitioner's complaint failed to state a claim of post-1976 denial of equal protection.

REASONS FOR DENYING THE WRIT

Petitioner agreed, in the course of the state civil action which she commenced, to have her application for renewal of staff privileges adjudicated by the board of governors. She did so pursuant to the advice of counsel, and, presumptively, with counsel's knowledge of the liberal review procedures under Ohio Revised Code § 2506.01 *et seq. Cincinnati Bell, Inc.* v. *Village of Glendale,* 42 Ohio St. 2d 368, 71 Ohio Op. 2d 331 (1975).

Moreover, as the record demonstrates, Petitioner was continuously represented by competent counsel who vigorously asserted her constitutional rights, and they were closely passed upon. (Appendix pp. 15a-27a) Petitioner has suffered no denial of opportunity to present those rights and have them protected in a "willing and able" forum.

Additionally, Petitioner chose not to preserve her rights to litigate federal claims in federal court by presenting such claims to the state courts only in order that their decisions could be made "in light" of such claims. *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964). She not only informed the state courts of her federal claims, but freely and without reservation submitted them for decision. *England* v. *Louisiana State*

Board of Medical Examiners, supra, prescribes the manner in which she could have preserved her claims had she wished to do so.

Further, although Petitioner makes much of her alleged lack of opportunity to prove Dr. Ayres' financial interest in her professional demise, the court of appeals found that Petitioner failed to take advantage of the statutory rights afforded her under Ohio Revised Code § 2506.03 (E) to offer additional evidence or cross examine witnesses who had testified against her before the board.

Even had the court of common pleas followed *Libis* v. *Board of Zoning Appeals,* 33 Ohio App. 2d 94, 62 Ohio Op. 2d 146 (Summit County, 1972), which it was not bound to do, Petitioner would not have been prevented from calling Dr. Ayres to testify. *Libis* imposes no prohibition against interrogating an administrative officer, especially a non-voting one, regarding an alleged conflict of interest.

This Court has spoken recently and extensively on the application of *res judicata* and collateral estoppel, both generally and in civil rights litigation. *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394 (1981); *Allen* v. *McCurry,* 449 U.S. 90 (1980); *Montana* v. *United States,* 440 U.S. 147 (1979); *Preiser* v. *Rodrigeuz,* 411 U.S. 475 (1973). The obligations imposed upon the rare litigant in Petitioner's position are clear and well defined, especially in the Sixth Circuit. *Coogan* v. *Cincinnati Bar Ass'n.,* 431 F. 2d 1209 (6th Cir. 1970). Indeed, it is significant that Petitioner cites no conflict between the circuits that must be resolved.

In *Allen* v. *McCurry, supra,* the Court, in an extensive opinion, fully applied established precepts of preclusion to actions brought under 42 U.S.C. § 1983, and confirmed

the validity of *Cromwell* v. *County of Sac,* 94 U.S. 351 (1877), in this context.

The specific holding of *Allen* v. *McCurry, supra,* and its recognition that 42 U.S.C. § 1983 does not restrict or repeal the traditional doctrines of preclusion enunciated in *Cromwell* v. *County of Sac, supra,* leave no doubt that the reach of the decision encompasses and disposes of all issues raised by Petitioner.

If in hindsight, Petitioner's "options" now appear more clear, it is not for this Court to redeem her from the course chosen by experienced counsel in the heat of battle. It is not a basis for review that Petitioner or her counsel made strategic errors. The law was clear and remains so. If Petitioner chose the incorrect "option", as she characterizes it, she alone must live with that choice. Her failure to preserve or pursue all rights to which she may have been entitled will affect only her.

Nor is Petitioner entitled to the relief that was rejected in *Allen* v. *McCurry, supra:* an unrestricted right to relitigate in federal court. She commenced the state court litigation, and her counsel directed its course. She vigorously asserted her claims, and they were passed upon. No litigant is entitled to more. None will receive less if Petitioner's aggravated oddyssey of litigation ends now.

CONCLUSION

For the reasons set forth above, Respondents David S. Ayres and Paul W. Terrell respectively submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Opposition

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No. 81-1846

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BARBARA LUSTGARTEN, M.D.,

Petitioner,

vs.

DAVID S. AYRES, M.D., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrines of res judicata and collateral estoppel preclude a party plaintiff from asserting civil rights claims in federal district court which were, or might have been, asserted in prior state court proceedings initiated by the same party as plaintiff represented by counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1846

BARBARA LUSTGARTEN, M.D.,

Petitioner,

vs.

DAVID S. AYRES, M.D., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLARIFICATION OF PETITIONER'S QUESTIONS PRESENTED AND STATEMENT OF THE CASE

The same fundamental distortion of the nature of the state court proceedings underlies both Petitioner's Questions Presented and Statement of the Case. The state court proceedings did not, as petitioner suggests, originate as an "administrative appeal." Rather, they originated on May 17, 1976, when Dr. Lustgarten filed a civil action against the administrator and Board of Governors of Highland District Hospital seeking to enjoin the Board from acting on the recommendation of the Medical Staff not to renew Dr. Lustgarten's privileges for the 1976-1977 staff year and for adjudication of her rights and status under the hospital and medical staff by-laws.

With the advice and guidance of counsel throughout, Petitioner waived, by agreed order in this state civil proceeding, her right to the elaborate hearing and review procedures provided by the Medical Staff and Hospital Bylaws, and received, by the same agreed order, a special expedited hearing before the Board of Governors. Both Petitioner and her counsel personally approved and signed the order, a copy of which is set forth in Petitioner's Appendix, p. 10a.

The Board proceeded to conduct the required hearing in ten distinct sessions, which produced a record exceeding 700 pages. The testimony related principally to the medical ethics and unprofessional conduct of Dr. Lustgarten; her relations with other members of the medical staff, hospital personnel and patients; her failure to comply with hospital by-laws and regulations; and included a reference by one witness for Dr. Lustgarten to discrimination on the basis of sex. Following the hearing, the Board voted not to renew Dr. Lustgarten's staff privileges.

On appeal to the Court of Common Pleas of Highland County, Ohio, pursuant to § 2506.01, et seq., Ohio Revised Code, that court affirmed the decision of the Board of Governors. Petitioner's Appendix p. 13a. While Dr. Lustgarten contended that the board hearing lacked due process, she did not raise her claims of sex and religious discrimination in this proceeding in the Common Pleas Court, although she could have done so under § 2506.03 (E), which expressly authorizes the introduction of new evidence and the cross-examination of witnesses who were adverse to her at the Board hearing. Similarly, nothing prevented Dr. Lustgarten from specifically including her discrimination claims in the complaint in the civil suit that produced the agreed order for a hearing before the Board of Gover-

nors. Neither did anything prevent her from filing suit in the United States District Court, and including her discrimination claims therein, at the time she filed her suit in the state trial court.

Dr. Lustgarten pursued the question of whether she had received due process at the board hearing from the Court of Common Pleas of Highland County to the Court of Appeals for Highland County, Ohio, which found that Dr. Lustgarten had not been denied due process and that "there is in fact such reliable, probative and substantive evidence to justify, if not compel, the Court of Common Pleas to confirm the order of the Board." Petitioner's Appendix, p. 27a. The Supreme Court of Ohio dismissed Dr. Lustgarten's appeal *sua sponte,* for the reason that "no substantial constitutional question exists herein." Petitioner's Appendix, p. 30a. On October 2, 1978, this Court denied certiorari. Petitioner's Appendix, p. 31a.

Much as Petitioner has distorted the nature of the state court proceedings, she has inaccurately characterized the decision of The United States Court of Appeals for the Sixth Circuit, as well as the pre-trial order of The United States District Court for the Southern District of Ohio. The Sixth Circuit held that Dr. Lustgarten's procedural due process claims had been fully litigated in the Ohio courts and are therefore barred by collateral estoppel, and further, that her civil rights claims could have been fully and fairly litigated in the state proceedings and are therefore barred by *res judicata.* With regard to the so-called "post-1976" equal protection and due process claims, the court held that no equal protection claim was started and that the due process claim must necessarily fail because the 1976 termination of her privileges extinguished, at that time, any property interest she possessed in a position on the medical staff. *See* Petitioner's Appendix, pp. 1a-4a.

The protestations of Petitioner in regard to the "factual controversies" reflected in the pre-trial order of the District Court are a ruse. Under the local rules of that court, counsel for all parties are obligated to prepare a joint schedule of all issues unable to be agreed upon by counsel. The court made no finding whatsoever that any of these issues were, in the language of Rule 56, Federal Rules of Civil Procedure, either "genuine," or "material." The District Court had before it each of the state court judgments and the complaint of plaintiff, which formed the basis for its decision granting the motion of defendants for summary judgment.

REASONS WHY WRIT SHOULD BE DENIED

Beyond the private interests of the litigants, there is nothing "special or important" within the meaning of Rule 19 of this Court about this case, which the courts below resolved according to established principles of *res judicata* and collateral estoppel,[1] and, with regard to the "post-1976" claims, due process.[2] The facts of this case are

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[1] *See, e.g. Cromwell* v. *County of Sac*, 94 U.S. 351 (1876); *Coogan* v. *Cincinnati Bar Ass'n*, 431 F.2d 1209, 1211 (6th Cir. 1970) (per curiam); *Accord, Tonti* v. *Petropoulous*, 656 F.2d 212, 216 (6th Cir. 1981).

[2] With respect to these "post-1976" claims, the Court of Appeals for the Sixth Circuit found no allegations in the complaint that board failure to take action on Dr. Lustgarten's 1978 and 1979 applications for medical staff privileges were influenced by or had anything to do with Dr. Lustgarten's sex, ethnic background or religion." Appendix, 3a, fn. 1. The Court of Appeals went on to conclude that the only post-1976 due process claim "must necessarily fail" in view of Dr. Lustgarten's lack of any property interest in a position on the medical staff after the 1976 termination of her privileges. Appendix, 4a.

unlikely to recur, and few, if any, other cases will be affected by the deliberations of this Court on this case. It presents no conflict between circuits for the Court to resolve nor a federal statute or regulation declared by a lower court to be unconstitutional.

Because Dr. Lustgarten had, as the Sixth Circuit held, full and fair opportunity to litigate her discrimination claims in the state courts of Ohio, there is no need for this Court to cultivate ground thoroughly plowed in *Allen* v. *McCurry,* 449 U.S. 90 (1980). At bottom, Petitioner seeks from this Court what does not exist as a matter of law, namely, one unencumbered right to litigate civil rights claims in federal court regardless of the legal posture in which they arise. *Allen* v. *McCurry, Id.,* at p. 103-104. Unlike McCurry, who was compelled to litigate the issues giving rise to his civil rights claims as a criminal defendant, Dr. Lustgarten chose, as a party plaintiff, with the advice of counsel, to file in the state court in the first instance and there agreed to the proceedings about which she has complained, ever since, in an unsuccessful journey through the entire state and federal court systems. Nothing prevented her from filing all of her claims in federal court in the first instance or from preserving her federal claims under the procedure outlined in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 419 (1964). Certiorari does not lie to assist competent counsel and litigants disappointed with the results of their tactical decisions.

This litigation, reminiscent of *Jarndyce* v. *Jarndyce* in Dickens' *Bleak House,* ought to end. If it does not, it will be impossible to explain to the Board of Governors of Highland District Hospital that they must continue to defend a decision denying one doctor staff privileges that has been upheld by the Court of Common Pleas of Highland County,

Ohio, the Court of Appeals for Highland County, Ohio, The Supreme Court of Ohio, this Court on certiorari on a previous occasion, The United States District Court for the Southern District of Ohio and the United States Court of Appeals for the Sixth Circuit. The law cannot be so futile.

CONCLUSION

For all of the foregoing reasons, the writ should be denied.

Respectfully submitted,

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Opposition

3

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No. 81-1846

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BARBARA LUSTGARTEN, M.D.,
Petitioner,

vs.

DAVIS S. AYRES, M.D., PAUL W. TERRELL, M.D., JOSE RAFFINAN, M.D., MARIA RAFFINAN, M.D., FRANK C. BAKER, CHARLES H. BAIR, JAMES GIBBS, JOHN W. ABERNATHY, WENDELL L. HAREWOOD, VIRGINIA ROGERS, KELLEY D. FERGUSON, LAWRENCE SONNER, GEORGE WILKIN, DANIEL WOLKER, GEORGE HASTINGS, T. J. BELLESON, EUGENE A. PYLE, ERNEST WILLIAMSON, R. PAUL PENCE, ED JOHNSON, JOHN H. HARDWICK, RICHARD GRIFFITH, BOARD OF GOVERNORS OF HIGHLAND DISTRICT HOSPITAL, HIGHLAND DISTRICT HOSPITAL,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON BEHALF OF RESPONDENTS JOSE RAFFINAN, M.D. AND MARIA RAFFINAN, M.D.

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QUESTION PRESENTED FOR REVIEW

Whether the principles of *res judicata* and collateral estoppel bar Petitioner from maintaining an action in federal court to regain her medical staff privileges at a hospital in Hillsboro, Ohio and thereby litigating claims which were or could have been asserted in prior litigation filed by Petitioner, which was decided against her on the merits and upheld upon appeal.

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SUPREME COURT OF THE UNITED STATES

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No. 81-1846

BARBARA LUSTGARTEN, M.D.,
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DAVIS S. AYRES, M.D., PAUL W. TERRELL, M.D., JOSE RAFFINAN, M.D., MARIA RAFFINAN, M.D., FRANK C. BAKER, CHARLES H. BAIR, JAMES GIBBS, JOHN W. ABERNATHY, WENDELL L. HAREWOOD, VIRGINIA ROGERS, KELLEY D. FERGUSON, LAWRENCE SONNER, GEORGE WILKIN, DANIEL WOLKER, GEORGE HASTINGS, T. J. BELLESON, EUGENE A. PYLE, ERNEST WILLIAMSON, R. PAUL PENCE, ED JOHNSON, JOHN H. HARDWICK, RICHARD GRIFFITH, BOARD OF GOVERNORS OF HIGHLAND DISTRICT HOSPITAL, HIGHLAND DISTRICT HOSPITAL,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON BEHALF OF RESPONDENTS JOSE RAFFINAN, M.D. AND MARIA RAFFINAN, M.D.

Respondents Jose Raffinan, M.D. and Maria Raffinan, M.D. respectfully request that this Court deny the petition

for writ of certiorari seeking review of the decision of the Court of Appeals for the Sixth Circuit, Case No. 80-3766. The opinion below is unreported but is set forth in Petitioner's Appendix at p. 1a.

STATEMENT OF THE CASE

Respondents Jose Raffinan, M.D. and Maria Raffinan, M.D. ("the Raffinans") are members of the medical staff of Respondent Highland District Hospital ("the Hospital") and are husband and wife. They are not and have not been members of the administration of the Hospital or Board of Governors of the Hospital.

Petitioner commenced her current litigation (hereinafter "Lustgarten III") on October 30, 1978 seeking injunctive relief to return her to the medical staff at the Hospital and money damages under 42 U.S.C. §§ 1983 and 1985 and the Ohio antitrust law. She alleges that the Raffinans were members of an illegal conspiracy composed of doctors, the Hospital administration and the Board of Governors that in 1976 deprived her of her privileges at the Hospital.

This action, however, was not the first time that Petitioner, Barbara Lustgarten, M.D., had sought relief from the courts. In 1974 she filed an action against Respondents David S. Ayres, M.D., Paul W. Terrell, M.D. and the wife of a local clergyman claiming that they had defamed her in order to "curtail her economic success in the practice of her profession" (hereinafter "Lustgarten I"). Summary judgment was granted in Lustgarten I in favor of all defendants on May 7, 1976.

The second piece of litigation involving the facts at issue in Lustgarten III was commenced by Dr. Lustgarten

on May 17, 1976 in Highland County, Ohio Common Pleas Court (hereinafter "Lustgarten II"). On May 4, 1976 the medical staff of the Hospital had voted 8 to 4 to recommend to Respondent Board of Governors of the Hospital ("the Board") the "non-reappointment" of Dr. Lustgarten for the July 1, 1976 to June 30, 1977 staff year. The Raffinans as members of the medical staff voted with the majority of the medical staff. In Lustgarten II, she sought to enjoin the Board from acting upon that recommendation.

Prior to commencing Lustgarten II, Dr. Lustgarten had a variety of legal avenues available to her to seek relief. She could have presented her civil rights claims in the state court action, she could have filed an action in federal district court or she could have pursued her appeals according to the Hospital's bylaws. With the advice of counsel, Dr. Lustgarten chose to file suit in state court, and on May 26, 1976 she executed the Judgment Entry in Lustgarten II which directed the Board to conduct the hearing which resulted in the termination of her privileges. (Petitioner's Appendix, pp. 10a and 11a).

It is clear, therefore, that in Lustgarten I and Lustgarten II Dr. Lustgarten selected the forum, specified the relief she sought, identified the persons who allegedly wronged her and in Lustgarten II agreed, with advice of counsel and knowledge of her various options, to a process whereby her rights could be adjudicated. At all points in the proceedings leading to the hearing before the Board, she was able to orchestrate and control the litigation.

The Board conducted the mandated hearing during June 1976 and received testimony for nearly 30 hours. The Raffinans testified at the hearing. Dr. Lustgarten had received notice of the allegations against her, was permitted to have witnesses testify on her behalf and was

permitted to question all witnesses at the proceedings. At all times she had the benefit of counsel selected by her. After hearing the evidence, which included allegations of sex discrimination, the Board voted 9 to 6 against her reappointment. Respondent Ayres, who was on the Board as the physician member, attended the deliberations of the Board but abstained from voting.

The decision of the Board in Lustgarten II was upheld upon review by the Court of Common Pleas of Highland County (Petitioner's Appendix, pp. 13a-14a) and the Court of Appeals for the Fourth Appellate District of Ohio (Petitioner's Appendix, pp. 15a-28a). In addition, the Supreme Court of Ohio overruled her Motion to Certify the Record (Petitioner's Appendix, pp. 29a-30a), and the Supreme Court of the United States denied her Petition for Writ of Certiorari on October 2, 1978 (Petitioner's Appendix, p. 31a). Less than a month later, Dr. Lustgarten filed Lustgarten III in federal court in Cincinnati seeking to regain her privileges.

The district court below upon a motion of all defendants granted summary judgment on the basis of *res judicata*. The court held that Dr. Lustgarten either presented or could have presented her claims in her prior litigation, and citing *Coogan* v. *Cincinnati Bar Association*, 431 F.2d 1209 (6th Cir. 1970), the court held that *res judicata* principles barred the relitigation of these issues (Petitioner's Appendix, pp. 5a-8a). The Sixth Circuit Court of Appeals affirmed that decision holding that her prior litigation had provided a forum for resolution of her civil rights claim, that the decision of the Board in 1976 extinguished her property right in her privileges and that Lustgarten III presented no new cause of action (Petitioner's Appendix, pp. 1a-4a).

REASONS TO DENY WRIT

Lustgarten III presents a classic application of *res judicata* and collateral estoppel. The dispute began at a local hospital in Hillsboro, Ohio in 1974 and festered as Lustgarten I for two years. In 1976 the medical staff recommended the non-renewal of Lustgarten's privileges, and as a result of the hearing mandated in Lustgarten II, the Board voted to uphold the recommendation and to reject her application for renewal.

The underlying issue in Lustgarten III is whether the Board denied Dr. Lustgarten any rights, privileges or immunities secured by the Constitution or federal law when it voted to deny renewal of her privileges effective July 1, 1976. It is clear that the Raffinans could not illegally conspire to deny Petitioner any rights which were properly removed. Prior to that 1976 action of the Board, Dr. Lustgarten arguably possessed a property interest in her medical staff privileges. If her privileges were to be terminated, she was entitled to due process in the form of notice of the reasons for termination and a fair hearing on the issues. Dr. Lustgarten has had her due process as determined by at least six courts, but the decision has consistently been to deny the renewal of her privileges.

Petitioner asserts that she "brought no such separate civil action in an Ohio court" and, accordingly, that Lustgarten II and the resulting appeals do not operate as a bar to this litigation. (Petition, p. 9). This assertion is patently false, for Dr. Lustgarten sought the protection of the Ohio courts in 1974 and 1976 in order to redress the same alleged wrongs at issue in Lustgarten III. In Lustgarten II, the Common Pleas Court with her approval directed the Board to conduct its hearing and render an expeditious opinion. In Lustgarten II, there was a de-

cision on the merits as to Petitioner's renewal of privileges, and she cannot litigate that matter again in Lustgarten III.

The principles of *res judicata* and collateral estoppel are designed to promote judicial repose and to eliminate duplicative litigation. *Montana* v. *United States,* 440 U.S. 147 (1979). This Court has clearly held that the principles of collateral estoppel apply to suits brought under § 1983. *Allen* v. *McCurry,* 449 U.S. 90 (1980). In addition, the implicit approval of the application of *res judicata* to § 1983 actions under *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), was greatly enhanced. In *Allen,* this Court rejected the reasoning of the 8th Circuit Court of Appeals that § 1983 provides every person the right to litigate federal civil rights in a federal district court.

Dr. Lustgarten asserts that Lustgarten II resulted in a "statutory administrative appeal." This assertion ignores the fact that she commenced the litigation and, accordingly, could have presented all of the issues she now raises. Her assertion also ignores the clear import of the statute which allows the introduction of additional evidence. In *Cincinnati Bell Inc.* v. *Village of Glendale,* 42 Ohio St. 2d 368, 328 N.E.2d 808 (1975), the Ohio Supreme Court stated:

> Although a hearing before the Court of Common Pleas pursuant to R.C. 2506.01 is not *de novo,* it often in fact resembles a *de novo* proceeding. R.C. 2506.03 specifically provides that an appeal pursuant to R.C. 2506.01 "shall proceed as in the trial of a civil action," and makes liberal provision for the introduction of new or additional evidence. R.C. 2506.04 requires the court to examine the "substantial, reliable and probative evidence on the whole record," which in turn necessitates both factual and legal determinations. Clearly, the function of a Court of Common

> Pleas in a R.C. Chapter 2506 appeal differs substantially from that of appellant courts in other contexts. 42 Ohio St.2d at 370.

In *Allen,* the prior litigation had been criminal in nature such that McCurry was restricted as to the manner in which the prior issues were adjudicated. Dr. Lustgarten, on the other hand, had taken the initiative in 1976 and should not be heard to complain of the result. She chose her forum, litigated the issues on the merits and is merely dissatisfied with the decision.

The facts of this case and the history of Dr. Lustgarten's complaints do not justify further hearings in this case. To allow Petitioner to litigate further the 1976 decision of the Board by adding new parties and framing new issues would encourage parties to sever their cause of action in order to perpetuate litigation stemming from a specific action.

CONCLUSION

This Court rejected the Petition for Writ of Certiorari of Dr. Lustgarten in 1978 and now has the opportunity to conclude this matter once and for all.

WHEREFORE, it is respectfully requested that the Petition for Writ for Certiorari be denied.

Respectfully submitted,

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